Dec 4 1861

Submitted on

printed arguments

Chief Justice Taney

SUPREME COURT OF THE UNITED STATES.

No. ~~288~~ 1261.49.

PAUL SEARS AND AL., LIBLTS. AND APP'TS,

vs.

RUFUS WILLIS, ADMT. OF AUGUSTINE WILLIS, DEC'D, CLAIM'T OF 4,885 BAGS OF LINSEED ET ALIAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

G. S. Gideon, Printer, 511 Ninth street, Washington.

Mr Justice Grier

633

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United States of America, Massachusetts district, ss.

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-eight, before the honorable Nathan Clifford, associate justice of the Supreme Court U. S.

In admiralty.

PAUL SEARS et als., libellants,
versi
4,885 BAGS OF LINSEED et alias,
RUFUS WILLS, claimant.

The appeal in this cause was entered in this court, on the fifteenth day of October, A. D. 1858, and the copy of the record from the district court is as follows, namely:

United States of America, district of Massachusetts, ss.

At a special district court of the United States, holden at Boston, within and for the district of Massachusetts, on Tuesday, the twenty-third day of March, in the year of our Lord 1857, before the honorable Peleg Sprague, judge:

PAUL SEARS et als., libellants,
versus
4,885 BAGS OF LINSEED et als.

This libel was filed in court on the seventeenth day of December, A. D. 1857, and is as follows, viz:

To the honorable Peleg Sprague, judge of the district court of the United States for the district of Massachusetts.

The libel and complaint of Paul Sears, of Boston, in said district, merchant, and of Reuben Hopkins, James Smith, Alexander Child, William N. Batson and Roland H. Crosby, owners of the ship called the Bold Hunter, against four thousand eight hundred and eighty-five bags of linseed, seven thousand pockets of linseed, and fifteen hundred and thirty bags of pegue cutch, marked A. W., now being in East Boston, in said district, and lately belonging to Augustin Wills, deceased, and all persons who may intervene for their interest therein, in a cause of contract, civil and maritime.

And thereupon your libellants allege as follows:

First. That on or about the twenty-sixth day of October, 1856, they being the owners of said vessel, the said Paul Sears, as their

agent, made a contract of affreightment relating thereto with certain persons, doing business under the firm of Tuckerman, Townsend & Co., whereby the latter agreed, among other things, to provide a cargo of Calcutta merchandise for the said ship, to be brought thence, and delivered in Boston, and to pay for the charter or freight of said ship fifteen dollars and fifty cents per ton on whole packages, and half rate on loose or broken stowage; charter payable one-half in five, balance in ten days after discharge in Boston; said credit on payment of charter not to impair ship owners' lien on cargo for freight. And to the performance of their agreements, the parties bound the ship and the freight on the merchandise to be laden on board thereof reciprocally, one to the other, in the sum of twenty-five thousand dollars, as by reference to said contract, on part of which the libellants are ready to produce, will fully appear.

Second. That on or about the day of 1857, the said ship was at Calcutta and ready to receive cargo; that the said Tuckerman, Townsend & Co. did not furnish a cargo for the same at the stipulated rates of freight of their own goods, but provided other persons to make shipments of merchandise on freight on lower rates of freight than were stipulated for in said contract, and among other persons the said Augustin Wills then shipped or caused to be shipped on board of said vessel a large amount of sugar, saltpetre, linseed, cutch, hides and other merchandise to be transported to Boston, and delivered to the said Wills, in payment of freight at various rates per ton, as will appear by reference to the bills of lading thereof; the whole amount of which freight to become due, and payable from the said Wills, was the sum of fourteen thousand nine hundred and forty-eight dollars fifty-seven cents, as appears by the schedule annexed.

Third. That the said ship, with the said merchandise on board, arrived in Boston on or about the 12th day of October past, and on or about the 19th commenced discharging, and continued to do so up to the 7th day of November or thereabouts, when the whole was discharged; that at the time when the unlading was commenced, the said Augustin Wills was sick, and did not attend thereto, and that Rufus Wills, of Newburyport, in said district, acted as his agent in relation thereto, and that the said Paul Sears, as agent for the owners, undertook to attend to the collection of the freight thereon.

Fourth. That by the said contract it was declared that the charter money should be paid, one-half in five and the other half in ten days after discharge; and that the said credit should not impair the ship owner's lien or privilege for freight; that by the bills of lading, freight was payable on delivery.

Fifth. That the goods consigned to the said Augustin Wills were delivered to his agent as discharged, but without any intention on either side that the lien or privilege should be waived or

impaired thereby, but the contrary was understood. While the discharge was proceeding and before it was finished, to wit, on the 26th day of said October, the libellants required and the said Rufus Wills paid on account of said freight the sum of five thousand dollars, and it was understood and agreed that the balance should be paid without delay, and at or before the time when the merchandise should be discharged and delivered.

Sixth. That the said Augustin Wills deceased intestate on or about the 30th day of said October, before said merchandise was fully discharged, and that there was no person then authorized to act for his estate and receive said cargo; but that these libellants allowed the said Rufus Wills, acting in behalf of whom it might concern, to receive and put the cargo in store, but without any intent to waive or impair their lien or privilege, and with the full expectation that administration would be immediately taken out, and that the administrator would immediately pay the balance of the freight due, and relieve the goods from the incumbrance thereof; and that the said Rufus Wills has been appointed such administrator, but though requested has neglected and omitted to this time to pay the balance due for freight as aforesaid.

Seventh. That the said Paul Sears, acting in behalf of the libellants, allowed the said Rufus Wills to ship a portion of the said merchandise, consisting of sugar, saltpetre and other articles, to foreign parts, but without any intent or agreement to waive their lien or privileges on the residue thereof, remaining in store as aforesaid, for the balance of freight due to them as aforesaid; and they, said libellants, insist that by virtue of the maritime law of the said contract and by the said bills of lading, they have a lien or privilege on the said linseed and cutch for the balance due for freight as aforesaid.

Eighth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Whereupon, these libellants pray that process may issue against the said four thousand eight hundred and eighty-five bags, and seven thousand pockets of linseed, and fifteen hundred and thirty bags of pegue cutch, and against the said Rufus Wills, administrator upon the estate of the said Augustin Wills, and all other persons intervening for their interest therein, and that the same may be condemned in the amount due to your libellants as aforesaid, and for costs.

PAUL SEARS,
Acting for Self and other Libellants.
F. C. LORING, *Proctor.*

U. S. circuit court, district of Mass.

Dec. 17, 1857.

Sworn to by the said Paul Sears, before me.

H. W. FULLER, *Clerk.*

Schedule.

Mr. AUSTIN WILLS

To SHIP BOLD HUNTER AND OWNERS, Dr.

1857, Oct.	To freight of merchandise from Calcutta to Boston, on 1219, 34, 10, at	$11 00	$13,418 56
	107, 0, 10, at	10 00	1,070 21
	83, 23, 11, at	5 50	459 80
			14,948 57
1857, Oct. 26.	By cash on account - - -		5,000 00
	Balance due - - - - -		9,948 57

Whereupon, by order of the judge, a warrant and monition issued, commanding the marshal to give notice to all persons concerned, that said libel had been filed, and that trial would be had thereon at a special district court to be holden at the United States court-house in Boston, in said district, on Friday, the first day of January, A. D. 1858, at ten o'clock a. m., and directing him to give said notice by advertising the same in one of the public newspapers printed at Boston, and by posting a copy of the same notice at the said court-house in Boston fourteen days at least before said day of trial, and also to take the said goods, wares, and merchandise into his custody, and to make due return of the said process, with his doings thereiu, on which the marshal made return as follows, viz:

United States of America, district of Mass., ss.

BOSTON, December 31st, 1857.

Pursuant hereunto, I have given notice to all persons concerned, that the libel within named has been filed, and that trial will be had thereon, by publishing the substance of the within monition in the Boston Courier, a newspaper printed in Boston, in said district, and by posting up a copy of the same notice in the U. S. court-house in said Boston fourteen days at least before the day within named for trial; and on the 17th day of December, 1857, I took twenty-three hundred and eighty-five bags of linseed, thirty-four hundred and sixty-six pockets of linseed, and fourteen hundred and thirty-eight bags of pegue cutch, into my custody on this warrant.

WATSON FREEMAN,
U. S. Marshal.

And on the 23d day of December, A. D. 1857, on motion of the proctor of said libellants, a warrant to deliver issued, directing the marshal to deliver said two thousand three hundred and eighty-five bags of linseed, and three thousand four hundred and

sixty-six pockets of linseed, to Rufus Wills, on which the marshal made return as follows, viz:

United States of America, Mass. district, ss.

BOSTON, Dec. 23d, 1857.

Pursuant to the within precepts, I have caused the within named linseed to be delivered to the person within named, and have taken his receipt for the same as under.

F. WARREN, *Dep. Marshal.*

BOSTON, Dec. 23d, 1857.

Received from Watson Freeman, marshal in and for the district of Massachusetts, the within named linseed in the same state as when seized and detained by his deputy.

And on the 5th day of March, A. D. 1858, the following answer was filed in court, viz:

To the honorable Peleg Sprague, judge of the district court of the United States for the district of Massachusetts:

And now Rufus Wills, of Roxbury, in the district aforesaid, merchant, as he is administrator with the will annexed, of the goods and estate which were of Augustin Wills, late of Newburyport, in said district, intervening for his interest in said linseed and said pegue cutch, now lying at East Boston, in said district, appears before this honorable court, and for answer to the libel and complaint of Paul Sears, of said Boston, merchant, and others, owners of the ship called the Bold Hunter, against the said linseed and the said pegue cutch, and against all persons who may intervene for their interest therein, and alleges and articulately propounds, as follows:

First. That the respondent, as he is administrator as aforesaid, is the lawful owner of the said linseed and said pegue cutch.

Second. That the respondent admits that the several matters set forth in the first, second, third, and fourth articles of said libel are true, as therein alleged.

Third. And the respondent, denying the truth and accuracy of the statements and allegations contained in the fifth, sixth, and seventh article of said libel, says that the facts were, and are in truth, that about the time or soon after the arrival of the said ship Bold Hunter at Boston, said ship having on board a large amount of goods belonging to said Augustin Wills, the master and owners thereof gave notice of such arrival to the respondent, and began to discharge and deliver said goods to the respondent and his agent, and continued so to discharge and deliver said goods, until the whole of said goods were so discharged and delivered into the possession of the respondent or his agent, absolutely and without any condition or qualification; that the re-

spondent and his agent superintended such discharge and delivery, and when said ship commenced to discharge her cargo, gave notice to the master of said ship, and said Sears, one of the owners and agent thereof, of his, the respondent's, intention to ship a large proportion of the said goods immediately to London; and to this end, and for the purpose of saving the expense of wharfage, the respondent directed that said goods, so fast as they might be taken out of said ship Bold Hunter, should without being landed upon the wharf be transhipped on board the ship Cyclone, then lying at the same wharf, alongside part of the time, and a part of the time just forward of said ship Bold Hunter, and said goods were so transferred from one ship to the other, without being landed upon the wharf, and with the full knowledge of said master and said Sears, as to their destination, under the superintendence and direction of the respondent and his agent, to the amount of one hundred thousand dollars or thereabouts in value; that the balance of said goods were discharged and delivered to the respondent and his agent, and by them received into possession, and caused to be conveyed and deposited in the United States warehouse for bonded goods, in the name of Augustin Wills.

And the respondent further says, that from first to last, during the discharge and delivery of said goods, no intimation or evidence of any kind was made or given by the master or any of the owners of said goods, or any one acting in their behalf, to the respondent or his agent, of the intention of said owners to rely upon a lien upon said goods for the payment of the freight, and that at no time was there any understanding or agreement touching a lien thereon, nor was any conversation had about a lien until some days after the discharge and delivery of said goods, when, after repeated applications for payment of the freight, which applications were uniformly refused by the respondent, on the ground that the owner, Augustin Wills, having deceased, he, the respondent, as he was advised, before administration granted, had no authority, and after administration could not prudently pay before he had ascertained the solvency of the estate, said Sears informed the respondent that the other parties blamed him, said Sears, for letting the goods go; admitted that he had lost his lien by the delivery, and added that he ought to have held on to the goods.

Fourth. The respondent admits that before the death of said Augustin Wills, which took place on the 2d day of November now last past, he paid said Sears the sum of five thousand dollars on account of the freight of said goods, but denies that he was required so to do, or that said Sears had at that time any right to require it; but said Sears represented, that he was just then much in want of money, and it would be a favor if the respondent would advance him some on account of the freight; whereupon, the re-

spondent advanced him said amount before said Sears required it, or had by delivery any right to require it.

Fifth. And the respondent denies that by virtue of the maritime laws, or by virtue of said contract, or by virtue of said bills of lading, the libellants have any lien or privilege on said linseed or said pegue cutch, for any balance due for freight, and alleges, that by the delivery of said goods, they waved their right to any lien thereon, and must rely, as the respondent believes they always intended to rely, upon the personal responsibility of said Augustin Wills.

Sixth. That all and singular the premises are true, in verification whereof, if denied, the respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

Wherefore, the respondent prays that this honorable court will be pleased to pronounce against the libel aforesaid, and to decree restitution of said linseed and cutch to the respondent, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

RUFUS WILLS.
STORY & MAY, *Proctors.*

District of Massachusetts, ss.

Sworn to by the respondent, before the district court for said district, March 5th, 1858.

Attest: S. E. SPRAGUE, *Clerk.*

And on the 23d day of March, A. D. 1858, the following agreed statement of facts was filed in court, viz:

United States district court.

PAUL SEARS and al., libellants,
vs.
BAGS LINSEED, &c.
} Facts agreed.

In October, 1856, the libellants, being owners of the ship "Bold Hunter," chartered her to Tuckerman, Townsend & Co. for a voyage from Calcutta to Boston, at the rate of fifteen dollars and fifty cents per ton on whole packages, and half that rate on loose stowage.

The charter party contains the usual lien clause, and stipulates that the freight should be paid "one-half in five, the balance in ten days after discharge in Boston, said credit on payment of charter not to impair ship owner's lien on cargo for frieght."

On arrival at Calcutta the charterers did not furnish an entire cargo and procured some shipments on freights, among others, one to Augustin Wills, of Boston, of a large amount, for which the master signed bills of lading, in the usual form, at various

rates of freight for different kinds of merchandise, all less than the charter rates.

On October 12th, 1857, the ship arrived in Boston, and soon after commenced discharging.

In the meantime, Tuckerman, Townsend & Co. had passed over the bills of lading of the merchandise on freight to the libellants in part settlement of the charter money, and Mr. Sears, one of the libellants, undertook to attend to the collection of the freight.

At this time Mr. Wills was sick, and his business was attended to by the claimant, his brother, and agent. Mr. Wills deceased November 2d, and November the claimant was appointed his administrator.

Soon after the arrival, and before the death of Mr. Wills, the vessel began to discharge her cargo, and completed the discharge on the 7th day of November.

All the goods consigned to Augustin Wills were delivered to, and taken possession of by the claimant, before the death of said Augustin as his agent, and after his death, as representing his estate, and the larger portion thereof, amounting in all to about one hundred thousand dollars, were discharged, at the request of the claimant, and with consent of the owners of said vessel, without being landed, into the ship Cyclone, bound to London, which was hauled alongside the Bold Hunter for that purpose, the claimant having informed the owners of the Bold Hunter of his intention to ship the goods immediately to London.

The remainder of the goods were discharged and delivered into the custody of the claimant or his agent, and by them conveyed to the custom-house stores, and then entered in bond in the name of Augustin Wills.

Nothing was said at any time by the owners of the Bold Hunter of their intention to hold the goods or any part thereof for the freight, but the goods were all discharged and delivered without qualification.

Before the death of Mr. Wills, the claimant, as his agent, at the request of Sears, who represented that it would be an accommodation, paid said Sears five thousand dollars on account of the freight.

After Mr. Wills deceased, and after the discharge was completed, Mr. Sears applied to the claimant for the balance of the freight, and was informed that nothing could be done until administration was taken out, when he hoped it would be adjusted to his satisfaction, or something to that effect.

Other applications were made after the expiration of the five and ten days, and after administration was taken out, to which the respondent answered that he was not certain how the estate would turn out, and that he could not safely pay it while any doubt remained.

The claimant alleges that at one time, when applying for pay-

ment, the libellant, Sears, said that he had been blamed by the other parties in interest for not holding on to the goods, and supposed he had lost his lien, and insists upon this as an admission to that effect. Said Sears does not admit the statement, but is willing to allow it to be presented, reserving the right to require proof thereof if the court shall deem it material.

The charter party and bills of lading may be referred to as a part of this statement.

If upon these facts, and the inferences to be drawn therefrom, the court shall be of opinion that the libellants have lost their lien or privilege, and are not entitled to hold the merchandise libelled for freight, the libel is to be dismissed with costs, otherwise the libellants are to have judgment for the balance of the freight due as by the schedule annexed to the libel, with interest and costs.

F. C. LORING,
Proctor for Libellants.
STOREY & MAY,
Proctors for Claimants.

This libel was entered at a special district court, held on the 17th day of December, A. D. 1857, and thence was continued from time to time, until this 23d day of March, A. D., 1858; and now, after a full hearing of the cause, upon the facts proved and arguments of counsel, and mature deliberation thereon had, the court doth order, adjudge and decree that said libel do stand dismissed with costs for the claimant, taxed at twenty-eight dollars and fifty-two cents.

From the said decree the said libellants claim and appeal as follows, viz:

And now the libellants claim and appeal from the decree of the district court, by which their libel was ordered to be dismissed with costs.

F. C. LORING, *Proctor.*

Whereupon, the said appeal was allowed by the court.

I, S. E. Sprague, clerk of the district court of the United States for the district of Massachusetts, hereby certify, that the foregoing is a transcript of the record of the said court in the said cause.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said court, this 19th day of May, A. D. 1858.

Attest: S. E. SPRAGUE, *Clerk.*

Addition to statements of facts.

U. S. district court, Mass. district.

SEARS vs. WILLS.

The agreed statement of facts may be amended by adding the following, if material:

"Wills & Co. knew that the ship was under charter."

Augustine Wills, the consignee, was not a member of the firm of Wills & Co., of Calcutta, but was doing business on his own account in Boston. Wills & Co. shipped to other parties besides Augustine Wills.

STOREY & MAY, *for Claimants.*
F. C. LORING, *for Libellants.*

Charter party.

This charter party, made and concluded upon in Boston, the sixth day of October, in the year one thousand eight hundred and fifty-six, between Paul Sears, managing owner of the ship "Bold Hunter," of Boston, of the burden of eight hundred tons or thereabouts, register measurement, now lying in the harbor of Boston, of the first part, and Tuckerman, Townsend & Co., merchants of Boston, of the second part, witnesseth: that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, doth covenant and agree on the freighting and chartering of the said vessel unto the said party of the second part, for a voyage from Boston to Calcutta, thence to Boston, dangers of the seas excepted, on the terms following, that is to say:

First. The said party of the first part doth engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage; and to provide, free of charge, for two passengers out and home, and others at ($100) one hundred dollars each.

Second. The said party of the first part doth further engage that the whole of said vessel (with the exception of the cabin, and the necessary room for the accommodation of the crew and the stowage of the sails, cable, and provisions) shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board, otherwise than from the said party of the second part or their agent, without their consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part doth further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part or their agents may think proper to ship. Ship to be placed at Devens' wharf, Charlestown, by party of first part. And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, doth covenant and agree with the said party of the first part to charter and hire the said vessel as aforesaid on the terms following, that is to say:

First. The said party of the second part doth engage to provide and furnish to the said vessel at Calcutta a full cargo of usual Calcutta merchandise, the goods to be such as will fill the entire capacity of the ship, in weight and measurement, not exceeding one-half of the cargo to be in linseed, the requisite dead weight to consist of saltpetre or its equivalent; also, loose stowage, as required by the master, to consist of pockets of linseed, ginger, or tumeric, bundles of twine, loose gunnies, loose ginger, either one or all, or part of each, at the option of charterers.

Second. The said party of the second part doth further engage to pay to the said party of the first part, or his agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say: fifteen dollars and fifty cents ($15 50) per ton on whole packages, and half rate on loose or broken stowage, on the cargo laden on board at Calcutta, the weight and measurement to be adjusted at the usual place in Calcutta, before shipment; also, to pay in Calcutta port charges, pilotages and pilot's buxies, latter not to exceed 250 rupees; charter payable one-half in five, balance in ten days after discharge in Boston; said credit in payment of charter not to impair ship owner's lien on cargo for freight.

It is further agreed between the parties to this instrument, that the said party of the second part shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid, lay day as follows, that is to say: fifty-five running days in Calcutta, to commence when the ship is entered at custom-house, and ready to discharge, and to terminate when the ship is cleared at custom-house. Usual dispatch in loading and discharging at Boston. And in case the vessel is no longer detained, the said party of the second part agrees to pay to the said party of the first part demurrage at the rate of seventy dollars per day, day by day for every day so detained, provided such detention shall happen by default of the said party of the second part, or their agent.

It is also further understood and agreed that the cargo or cargoes shall be received and delivered at ship's tackles alongside, at the ports of loading and discharging.

To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns, (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances; and the said party of the second part, the freight or the merchandise to be laden on board,) each to the other in the penal sum of twenty-five thousand dollars.

In witness whereof, the said parties have hereunto interchangeably set their hands.

TUCKERMAN, TOWNSEND & Co.

Delivered in the presence of

PAUL SEARS.

Bill of Lading.

Shipped in good order and condition by Wills & Co., being for account and risk of Augustin Wills, Esq., of Boston, Mass., United States of America, on board the good ship called the "Bold Hunter," whereof, Crosby is master, for this present voyage, now lying in the port of Calcutta, and bound for Boston, United States of America; to say

Tons 10, 39, 6, AW 41 *a* 50, SC 161 *a* 170, twenty bales cowhides.

Tons 73, 20, 4, PC $1, fifteen hundred and thirty bags pegue cutch.

Tons 84, 20 00 *a* $11.00 per ton, $929 50,

being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of Boston, United States of America, (the dangers of the sea only excepted,) unto Augustin Wills, Esq., of Boston, or to his assigns, he or they paying freight for the said goods at the rate of eleven dollars per ton.

In witness whereof the master of the said vessel hath affirmed to six bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Calcutta, May 1st, 1857. R. H. CROSBY.

Quality unknown.

Deposition of N. C. Tuckerman.

I, Newcomb Cappe Tuckerman, reside in Calcutta; and I am thirty years old; and a commission merchant, and a member of the house of Whitney & Company, of Calcutta. The ship Bold Hunter arrived to our consignment in the spring of 1857; she was under charter to Messrs. Tuckerman, Townsend & Co., of Boston. I did not deem it expedient to load her on their account, and I re-chartered her to Messrs. Wills & Co., of Calcutta. We chartered to them the whole capacity of the ship, except about fifty bales of buffalo hides. We gave to them a shipping order, and they signed an agreement, on the back of the original charter, partly to load the entire capacity of the ship, excepting the fifty bales of hide, at eleven dollars per ton; all the other conditions to be in accordance with the original terms of the charter party. That charter party is with my house in Calcutta, on file there. The fifty bales were shipped on account of Tuckerman, Townsend & Co., in order to give the owners security for full freight, according to the charter party.

N. C. TUCKERMAN.

Massachusetts district, June 14, 1858.

Subscribed and sworn to before me, as a deposition to be used in a cause pending in the United States circuit court, wherein

Paul Sears is libellant S bags of linseed and cutch, and Rufus Wills, administrator of Augustin Wills, is claimant, by consent of counsel.

C. W. LORING,
United States Commissioner for district of Mass.

This appeal was entered at the May term of this court, A. D. 1858, where the libellants appeared by F. C. Loring, Esq., their proctor, and the claimant, by Messrs. Storey and May, his proctors. The foregoing "addition to statement of facts" in charter party and bill of lading were, by consent of parties, taken as a part of the record, and the deposition of N. C. Tuckerman was filed and made part of the case. The same was thence continued to this present term, and now (to wit, on the twenty-third day of March, A. D. 1859) the following decree is made by the court, namely: This cause came on to be heard on the transcript of the record of the district court and additional facts shown, and was argued by counsel; and now, after mature deliberation thereon had, it is here ordered, adjudged, and decreed by this court that the decree of the district court in this cause be, and the same is hereby, affirmed with costs for the claimant, taxed at and that said libel be dismissed accordingly. From which decree the said libellants, in open court, do claim an appeal as follows, to wit:

And now the said libellants claim an appeal from the decree by which the said libel was ordered to be dismissed to the Supreme Court of the United States, to be held at Washington on the first Monday of December next, and are ready to give bond to prosecute the same according to law.

F. C. LORING, *Proctor.*

Whereupon, the said appeal is allowed by the court, and said libellants give good and sufficient security that they will prosecute their appeal with effect, and answer all damages and costs if they shall fail to make the same good; which security is approved by the court.

Attest: H. W. FULLER, *Clerk.*

United States of America, Massachusetts district, ss.

I, Henry W. Fuller, clerk of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of Paul Sears, Reuben Hopkins, James Smith, Alexander Child, William N. Batson, and Roland H. Crosby, owners of ship Bold Hunter, libellants, vs. 4,885 bags of linseed et alias, (Rufus Wills, adm'r, claimant,) in this court determined.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-nine, at Boston.

[L. S.]

H. W. FULLER, *Clerk.*

Bond to prosecute appeal.

Know all men by these presents, that we, Paul Sears, of the city of Boston, merchant, as principal, and Joseph S. Hilliard and Charles E. Sears, as sureties, are held unto Rufus Wills, of said Boston, administrator in the estate of Augustine Wills, in the sum of two hundred dollars, to the payment whereof we jointly and severally bind ourselves, our heirs, executors, and administrators; dated at Boston, this thirteenth day of April, A. D. eighteen hundred and fifty-nine.

Whereas lately, in a suit depending in the circuit court of the United States for the first circuit, wherein said Paul Sears and others were libellants, and said Rufus Wills was claimant, judgment was rendered against the said Sears, from which he has claimed an appeal to the Supreme Court of the United States, to be held at Washington on the first Monday of December next: if the said Sears and others shall duly prosecute said appeal, and answer all damages and costs if he fail to make the same good, then this obligation shall be void.

PAUL SEARS, [SEAL.]
JOSEPH S. HILLIARD, [SEAL.]
CHARLES E. SEARS. [SEAL.]

Witness:
GEORGE T. SEARS.

A true copy. Attest: H. W. FULLER, *Clerk.*

I am satisfied with this bond.

STORY & MAY,
Proctors for Cl'ts.

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Supreme Court of the United States,

DECEMBER TERM, 1859.

IN ADMIRALTY.

PAUL SEARS AND ALS., Libellants and Appellants,

versus

4885 BAGS OF LINSEED, etc.

RUFUS WILLS, Administrator, Claimant and Appellee.

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ARGUMENT FOR APPELLEE.

The facts material to the determination of the question under discussion, as they appear to the claimant, are exactly as follows:

In October, 1856, Sears and others, the Libellants, chartered their vessel, the Bold Hunter, to Tuckerman, Townsend & Co., of Boston, for a voyage from Boston to Calcutta and back, at $15.50 per ton freight on the cargo laden on board at Calcutta. On the arrival of the Bold Hunter at Calcutta, Whitney & Co., (*see Tuckerman's deposition*) the agents and consignees of Tuckerman, Townsend & Co., not deeming it expedient to load the vessel for their account, *re-chartered* her to Wills & Co., of Calcutta, at $11 per ton, except fifty tons capacity which were reserved to Tuckerman, Townsend & Co., Wills & Co. agreeing, with the above exceptions as to price and capacity, to the original terms of the Charter Party. Wills & Co. put up the vessel as a general ship, and loaded her with goods shipped under special Bills of Lading to divers parties in Boston (*see Addition to Statement of Facts*); and, amongst the rest, to Augustin Wills, the claimant's intestate, for his account and risk, he paying freight on delivery (*see Bill of Lading*). Augustin Wills was not a member of the firm of Wills & Co.; but was doing business on his own account in Boston. "All the goods so shipped and consigned to Augustin Wills, were *delivered to* and *taken possession of* by the claimant, before the death of said Augustin, as his agent, and after his death as representing his estate, and the larger portion thereof * * * were discharged, at the request of the claimant, and with the consent of the owners of said vessel, without being landed, into the ship Cyclone, bound to London, which was hauled alongside for that purpose,

the claimant having informed the owners of the Bold Hunter of his intention to ship the goods immediately to London. The remainder of the goods were discharged, and *delivered* into the *custody of the claimant*, or his agent, and *by them* conveyed to the Custom House Stores, and there entered in bond *in the name* of Augustin Wills. *Nothing was said at any time by the owners of the Bold Hunter of their intention to hold the goods, or any part thereof, for freight; but the goods were all discharged, and delivered without qualification*" (Facts Agreed).

The libellants claim a lien upon, and seek to enforce it against, the goods, notwithstanding the delivery.

This the claimant resists, contending that by the absolute and unqualified delivery the *lien* was lost, and that the libellants stand upon the same footing with the other creditors, and are left to their remedy *in personam*—because

I. By the general principles of law, maritime as well as common, the carriers' lien for freight is a right to hold, not a right to retake. It begins with, rests upon, and ends with the possession; and a voluntary delivery by the party who has a right to hold, puts an end also to the right which that possession gives. It is a right *in rem*, good while the *res* is in possession, and useful to enforce payment; but delivery has always been held to be a waiver, or rather an abandonment of the right. With the possession goes the lien; the principal carries with it the incidental.

These principles are so familiar and so well settled, that no cases need be cited in their support. Indeed, they are admitted by the appellants, who say, on page sixth of their argument, "it may be correctly said that the lien for freight, by the maritime as well as by the common law, is lost by delivery, if absolute and unconditional." The passages just cited from the "Facts Agreed," show that all the goods were delivered and taken possession of by the claimant, nothing being said at any time of any intention to hold them, or any part thereof, for the freight, and all being discharged and delivered without qualification. If this is not an absolute and unconditional delivery it is difficult to see what would be, and it would seem that the case for the appellees is established so that nothing further need be said to justify the several decrees in their favor in the Courts below.

II. But say the appellants, notwithstanding the delivery our lien holds good, because "even by the common law, if the delivery is under an agreement, express or implied, that the lien shall not be affected, it remains good as between the parties;" and in this case "the delivery was made under an agreement that the lien for freight should not be affected thereby," i. e. by the delivery; and the following clause from the Charter Party is relied upon: "*Charter* payable one half in five, balance in ten days after *discharge* in Boston; said *credit* in payment of charter not to impair ship owner's lien on cargo for freight."

Now, in the first place, Augustin Wills, whom the appellee represents, was no party to any such agreement. Sears and others, on the one part, and Tuckerman, Townsend & Co., on the other, were the original parties to that agreement, and Wills & Co. afterwards by their agreement with Tuckerman, Townsend & Co. (*see Tuckerman's deposition*) became bound to the latter to fulfil the conditions of the Charter Party, with certain exceptions. But Wills & Co. and Augustin Wills were two separate concerns (*see Addition to Statement of Facts*); the former doing business in Calcutta, and the latter in Boston. To put it in the strongest light for the appellants, Wills & Co. chartered the vessel of T. T. & Co., as T. T. & Co. had chartered it of the owners, and put the ship up for Boston as a general ship, making special contracts, to wit: Bills of Lading, with the divers consignees, amongst whom Augustin Wills was one. He was merely a sub-freighter, like the rest of the consignees, and the only contract to which he was a party was the Bill of Lading under which goods were shipped to him. Wills & Co. were no more his agents than they were the agents of any other party to whom goods were shipped, i. e. merely for the purpose of forwarding the goods. Nor do they profess to act as agents. They agree with T. T. & Co. for themselves, not as agents for others. The statement of the learned counsel for the appellants, on page 18th of his argument, that Wills & Co. were the agents of Augustin Wills is true only in this qualified sense; and the further statement that "the consignee, the claimant's intestate, knew, it is admitted, that the ship was under charter, and was therefore affected with knowledge of its contents," is a very great mistake. The learned counsel most clearly misapprehends. It is agreed that *Wills & Co.* knew there was a charter; but there is no such evidence as to Augustin

Wills. On the contrary, it is clear that he could not actually have known that such was the fact. He could not even know on board what vessel the goods were shipped, until he had received advices of the shipment from Calcutta. The doctrine that the sub-freighter or consignee, is to be bound by the conditions of the Charter Party, his Bill of Lading not referring thereto, is a novel and most dangerous one, utterly subversive of the freedom of commercial intercourse. No man could ship goods on board a vessel with any safety. As well might it be contended that the sub-lessee of a house incurs the obligations of the lessee towards the original lessor.

Abbott on Shipping, 6th Ed. Marginal, pp. 287, 8.
Paul v. Birch, 2 Atk., 621.
Mitchell v. Scaife, 4 Camp. 298.
Faith v. East India Co., 4 B. & A., 630.
Small v. Moates, 9 Bing., 574.
Shepard v. DeBernales, 13 East., 570.

The true doctrine undoubtedly is, that unless the sub-freighter or consignee has notice of the special dispositions of the Charter Party, or his Bill of Lading makes the freight payable as per Charter Party, there is no lien against him except upon his specific goods for the particular service rendered, and this is subject to the general principle that delivery is a waiver.

The Charter Party is the contract by which the owner and the charterer are bound to each other, and which determines their relations. But the Bill of Lading, a contract made and signed by the master, as agent for the owner, subsequent to the Charter Party, and in this case purposely differing therefrom in its terms, and by which the owner is as much bound as by the Charter Party, determines the relations of the owner to the shipper, sub-freighter and consignee, and is the sole measure of their obligations. If that had been, as is often the case, freight payable as per Charter Party, there might have been some ground to claim that the consignee became bound by its conditions. But in this case there is not only no reference made to any Charter Party, but the freight is expressly made payable on delivery. It surely will not be seriously contended that Augustin Wills, under the Bill of Lading, could claim the benefit of the credit provided for in the Charter Party. If

not, how can it be contended that he is subject to any other of its conditions?

But, in the second place, the clause invoked from the Charter Party has no such force or effect as is contended for between any parties. The agreement is that the *credit* of five and ten days after *discharge* shall not affect the ship-owners' lien for freight. This credit was undoubtedly provided for in order to give the charterer time to collect his dues, under the Bills of Lading, from the divers consignees, wherewith to pay his charter money. The ship owners say, in effect, you may have the goods discharged so that the consignees may examine and see if they are in good order, and you collect your freights, and for this we will give you five and ten days. But this is a very different agreement from an agreement to deliver. Under it they had a perfect right to detain the goods, and not *deliver* them till the freight is paid. Such an agreement is entirely consistent with their retention of the possession of the goods, and of course of the lien. They were not bound by it to deliver them, and therefore it is that by the delivery they forfeited their lien. The exact meaning and effect of such an agreement, is learnedly and fully discussed by the late Mr. Justice Story, in the case of certain Logs of Mahogany, 2 Sumner, 589, where the distinction between discharge and delivery is clearly stated and illustrated. To the same effect, also, is the case of The Volunteer, 1 Sumner, 570, where the question was whether a stipulation that the freight shall be payable in ten days "after the return" of the vessel, was a waiver of the lien, and it was held that it was not. Both cases show clearly enough that the appellants were not bound to deliver the goods before payment of freight. The delivery was therefore a voluntary act, waiving the lien, and the special agreement in the Charter Party, even if it bound the appellee (which it does not, as has already been shown), cannot have the effect to save the lien, notwithstanding the delivery; or, in other words, to deprive the act of delivery of its ordinary legal significance.

III. But the exigencies of their case have driven the appellants to the proposition, "that by the maritime law the ship owner has a lien or *privilege* upon the goods for the freight; that this lien exists independently of possession, and is not necessarily lost by delivery to the debtor." No deci-

sion either of the common law or Admiralty Courts of England or of this country is cited in support of such a proposition, and none can be found. The uniform tenor of the law, as administered in both courts for more than two centuries, is against it.

The maritime law, however, it is said, is derived from the civil law; the civil law gave a privilege to carriers, and this privilege did not depend upon possession, nor was it lost by alienation. Now, as in the other part of their argument, the fallacy of the appellants consists in confounding *discharge* with delivery, so here the fallacy consists in confounding the carriers' lien of the common law, and of modern commerce with the carriers' *privilegium* of the civil law. All the cases show that the carriers' lien for freight is possessary—a mere right to hold. Not to go out of our own reports, the cases from Sumner's Reports, already cited, proceed upon this postulate. Parker v. Hill, 2 Wood & Minot, 106, is explicit, and the case of Raymond v. Tyson, 17 Howard, U. S., 53, would seem to have rendered discussion upon this point, in this Court, at least, unnecessary. See also Parsons' Mer. Law, p. 345, note. But the carrier's privilege of the civil law gave no right to detain the goods. This the learned counsel for the appellants himself admits, when he says, at the bottom of page 12, "It does not appear that by the civil law the carrier had a right to retain the goods until the freight was paid. The right to detain the thing itself until payment, seems to be of later growth." The *privilege* of the civil law was a right of priority or preference as between creditors, which followed the goods, and depended in no respect upon possession. The carriers' *lien*, both by the common law, and "of later growth" in the maritime, is a right to hold as a means to compel payment. If the holder elects to deliver the goods he of course elects at the same time to waive that means of compelling payment and to rely upon the ordinary processes. Some maritime liens are like the *privilegium* of the civil law, such, for instance, as the liens for supplies and materials. The distinction is referred to by Walworth, Chancellor, in Van Bokelin v. Ingersoll, 5 Wend., 315, where he says of the right of the master to retain the freight money after it has come into his possession, and his lien upon the cargo to compel payment of the freight, as agent and acting for the owner, that they are in the nature of the common law liens, and are lost with the possession, while the claim of the master on the freight

for supplies, as against the owner, before it has been paid, is a maritime lien *not strictly a lien or right to retain possession*, but is the *privilege* of the civil law, an equitable lien, which may be enforced though the claimant never was in actual possession. p. 324.

Pardessus, *Conus. de Droit. Com.*, Part iv., Tit. viii., ch. 1, § 3, ¶ 954, defines this privilege as "the legal ground of preference of one creditor over the other."—"*Les privileges etant des causes legitimes de preference d'un creancier sur les autres*," and from what he says in ch. 3, ¶ 962, it is clear that but for the special provisions of the *Code de Com.*, extending to the owner the right to this privilege or preference until fifteen days after delivery, the privilege would be lost by the delivery; for he says that although the owner must discharge the goods so that they may be examined by the consignees, yet he may at the same time demand that the goods be placed in the custody of a bailee, either agreed upon or appointed by the Court, and thus *preserve his privilege till payment, so long as the goods remain in his custody*. That is to say, if the owner sees fit to deliver he may, and notwithstanding that, he may have his privilege by special provision of law for fifteen days: but if he means to make this privilege the means of compelling payment of his freight he must not deliver the goods, but keep them in custody of himself or his bailees. The privilege upon the cargo for freight is, therefore, even by the maritime law, except as modified by the provision of the *Code de Com.*, precisely the common law lien, i. e. a right to hold to compel payment.

Whether, however, by the maritime law of Continental Europe, the goods might be followed after delivery or not, such a right has not been imported into, or recognized in either the maritime or common law of England or of this country, and it is too much to ask that this Court will, at this late day, inaugurate a principle so little in harmony with our previous history, and tending so directly to clog the freedom of commercial enterprise.

The argument of the counsel for the appellant, under his last two heads, pp. 25 and 27, is based upon the assumption that Augustin Wills was a party to the agreement contained in the Charter Party. But this, as has already been pointed out, is an entire misapprehension. The agreed facts negative the idea that he actually or constructively knew any thing of the contents, or even of the existence of the Charter

Party. The argument, therefore, has no basis upon which to rest, and needs no further notice.

The counsel for the appellees deems it his duty, in justice to the learned Judge who gave the decision in the Dist. Court, to say that his recollection and minutes do not at all coincide with the statement of the learned counsel for the appellants, as to the ground upon which the decree was based. On the contrary, that learned Judge based his decision upon the grounds, 1st. That the lien was lost by the delivery; and 2d. That the special provision of the Charter Party did not obviate the effect of that delivery. It was, indeed, intimated that even if the special agreement in the Charter Party had given the owner the right to follow the goods, as against the charterer, notwithstanding the delivery, yet the consignees, not being a party to that agreement, could not be affected thereby. But this was not necessary to the decision, and though clearly correct was not made a ground of the decision, but was a mere intimation of the views of the Court upon that point.

The truth seems to be that the ship owner had entire confidence in the ability of Augustin Wills to respond for the freight, that he delivered the goods without hesitation, was promptly paid in part, and would doubtless have been paid in full, but for the sudden and unexpected death of Mr. Wills. This, of course, necessarily suspended payment till the appointment of an administrator. Meanwhile the great commercial revulsion of 1857 made the rich merchant of yesterday the insolvent of to-day, and then it was that, for the first time, the libellants conceived the idea of resorting to the goods, whereby to get the advantage of the other creditors. The appellee felt it his duty to resist this claim, as the administrator of the estate, for the equal benefit of all the creditors; and, in conclusion, respectfully submits, for the reasons already given—

1st. That the lien was lost by the delivery;

2d. That the owners have no right, notwithstanding the delivery, to follow the goods for the price of their carriage, by virtue of any special contract;

3d. That the special contract relied upon by the appellants has no such force, and was introduced into the Charter Party *ex abundantia cautela* as a *caveat*, lest *discharge* should be construed to mean *delivery*, whereby the owners might be compelled to deliver before payment, the owners

intending merely, for the accommodation of the charterers, to give the latter an opportunity to collect their freight from the shippers and consignees, wherewith to pay the charter money, reserving at the same time to themselves the right to refuse to deliver till payment, if circumstances should render it necessary.

4th. That, whatever be the effect of such special contract, it can have no force or effect as against the appellee as he was no party thereto.

5th. That if, by the maritime law as interpreted in those countries where the civil law prevails, the appellant would have any such right as is claimed, such a right has never been adopted or recognized in the Courts of England or the United States, and would if now adopted be at war with the spirit of modern commerce; and

6th. That even by the maritime law of France, as now administered by their Courts, the carrier's privilege upon the cargo for freight, is, independently of the special provision of the *Code de Commerce*, merely the common law lien, as recognized and administered in our Courts; and is lost by delivery.

The decree of the Circuit Court, therefore, in affirmation of the decree of the District Court, ought itself to be affirmed.

SAM'L D. BATES,
STORY & MAY,
for Appellees.

Supreme Court of the United States.

DECEMBER TERM, 1859. 60

No. 126

PAUL SEARS ET ALL.

LIBELLANTS AND APPELLANTS,

vs.

4885 BAGS OF LINSEED, ETC.

RUFUS WILLS, ADMR. CLAIMANT.

ARGUMENT FOR THE APPELLANTS.

PAUL SEARS & ALL.,

LIBELLANTS AND APPELLANTS,

vs.

4885 BAGS OF LINSEED, ETC.

RUFUS WILLS, ADMR. CLAIMANT.

ARGUMENT FOR THE APPELLANTS.

THE Libellants come into Court under the disadvantage of decisions against their claim in the District and Circuit Courts. If these had been made on the same grounds of law or fact, they might have been submitted to without an appeal. But it was not so. In the District Court, the principal ground of decision was that the consignors and consignees were not parties to the charter party, and not affected by its stipulations — a supposed fact not then appearing, and positively disproved by testimony afterwards taken. In the Circuit Court, the principal ground is understood to have been, that the Libellants had waived their right of lien; which seems to have been inferred from two facts: one, the statement in the "Facts Agreed," that the goods were delivered "*without qualification*" — a phrase to which, it will be frankly admitted by the counsel for the Claimant, much more emphasis was given than was intended — the true meaning being only that at the time of delivery nothing was said as to a lien; and the other, that the

libel was not filed till several months after the delivery of the goods, whereas it was in fact filed almost immediately after the credit expired, the grant of administration, and the final refusal of the Claimant to pay the freight.

The law, as ruled in either Court on the actual facts, was not adverse to the recovery of the Libellants, and believing that their case has not been correctly understood, and is founded in justice and equity, they have appealed to this Court.

The facts are to be found in the "Agreed Statement" on which the case was heard in the District Court, on an amendment thereto, and on a deposition taken in the Circuit Court, and may be briefly stated as follows:

The Libellants, being the owners of a ship called the Bold Hunter, in October, 1856, chartered it to Tuckerman, Townsend & Co., merchants of Boston, who agreed to furnish an entire cargo from Calcutta to Boston, at certain rates of freight.

By the charter party the freight or charter was payable "*one half in five, balance in ten days after discharge in Boston; said credit in payment of charter not to impair shipowners' lien on cargo for freight.*" And it was also stipulated that the freight, or merchandise to be laden on board, should be bound for the performance of the agreements in the charter party, *i. e.* for the payment of freight, in the sum of twenty-five thousand dollars.

On arrival in Calcutta, Whitney & Co., the charterers' agents, thought it inexpedient to load her on their account, and they *assigned the charter party* to Wills & Co., *who agreed to perform its conditions* and to furnish a cargo at a lower rate of freight than the charter freight. To indemnify the owners against loss thereby, it was arranged that Whitney & Co. should ship, on charterers' account, 40 bales of hides, as security for the payment of the difference between the charter freight and that then agreed upon.

Wills & Co. shipped the residue of the cargo, the principal portion being for the account of Augustin Wills, the respondents intestate, whose agents they were.

On arrival in Boston, in October, 1857, the discharge and de-

livery of the cargo commenced, and during it the Libellants asked for payment of some money on account of freight, and $5000 were paid, *as matter of accommodation, not of right.*

Mr. Wills died before the discharge was completed, and the respondent, who had acted as his agent, and was appointed to administer upon his estate, November —, received the cargo — a large portion of which was delivered, at his request, on board of a vessel bound for London. The residue, being much more in value than the freight of the whole, was received by the Claimant as agent of the consignee, conveyed to the custom-house stores, and entered in the name of the consignee.

After the delivery was completed, about November 7, and the five and ten days credit had expired, the Libellants repeatedly applied for payment of the balance of freight, which was declined on the ground that nothing could be done till administration was taken out, and afterwards on the ground that the estate might prove insolvent. This libel was then filed, December 17, against the goods, to enforce the lien for freight, based on the agreements in the charter, that the merchandise should be held liable for the freight, and that the credit given *should not impair the ship-owners' lien.*

Upon these facts, the question presented is, whether or not, by reason of the delivery, the Libellants have lost their claim or privilege upon these goods for freight.

The existence of a lien before delivery, both by the maritime and common law, will not be denied. Each recognizes it, and the former provides means for its enforcement by judicial process, while the remedy given by the latter seems to be only the right to detain the goods.

At common law the right is a mere possessory lien, which is lost by delivery, if absolute and unqualified. By the maritime law it is a privilege, or right to have payment out of the goods for the service rendered in transporting them, in preference to other creditors.

Maritime liens do not depend on possession, and frequently exist where that is impossible. They may however be waived or

lost by agreement or laches; and, when accompanied with possession, an absolute delivery is strong evidence of waiver. Therefore, it may be correctly said, that the lien for freight, by the maritime as well as by the common law, is lost by delivery, if absolute and unconditional. This qualification is necessary, because even by the common law if the delivery is under an agreement, express or implied, that the lien shall not be affected, it remains good as between the parties, and by the maritime law such an agreement would preclude the inference of waiver created by delivery.

In the present case a lien existed before the goods were delivered. The Claimant insists that it was lost by delivery. The Libellants reply that the delivery was made under an agreement that the lien for freight should not be affected thereby. The Claimant rejoins that such is not the meaning of the clause relied upon, and that, on the facts in the case, the Libellants have lost their lien.

In presenting the Libellants' case for the consideration of the Court, I shall endeavor to show that, by the maritime and common law, they are entitled to the benefit of a lien as against the consignee and his representatives; there being fortunately no third parties, claiming as purchasers, or as otherwise interested, to interpose any equitable rights.

As both systems of law give the carrier a preference over other creditors for his service rendered in transporting the goods, thereby making him a privileged creditor, it is no assumption to say, that these Libellants, seeking the benefit of the privilege which the policy of the law gives them, are entitled to the favorable consideration of the Court, and that it will not be presumed against them that a right so favored by the law has been lost or waived, unless the circumstances clearly show negligence in enforcing it, or an intent to waive it.

As the delivery was made under an "agreement," it is necessary to consider first what that is. It is in two parts, and in these words: First part — "*Charter payable one half in five, balance in ten days after discharge in Boston.*" Second part — "*Said*

credit in payment of charter not to impair shipowners' lien on cargo for freight."

The obvious meaning would seem to be, that the charterers were to have five and ten days in which to pay the freight after the cargo was delivered to them, and before they could be called upon to pay it; and that if the freight was not paid in that time, the shipowner should have the same right to enforce his lien upon it as if delivery had not been made. It will, however, be argued, that discharge, as here used, means merely an unlading, not a delivery; and the only right the charterers acquired by virtue of this clause, was that of not being called upon to pay freight for five or ten days after the cargo should be unladen, the shipowner having the right in the mean time to retain it in his possession.

If the first part stood alone, it might admit of this construction, though it would be difficult to see, in that case, the utility of the clause to either party. The shipowner would acquire no right thereby, and the owner of the goods only a right not to be sued or have his goods seized for five or ten days after they were unloaded — a right of not the least practical value, as he would have no right to take them out of the possession of the shipowner, and he could not sell or dispose of them, so as to give a good title, while in such possession and subject to the lien for freight.

If, on the other hand, the clause means that the charterer should not be called upon to pay the freight till five and ten days after the cargo was *delivered* to him, and that if he did not pay it then the shipowner might resort to the goods, it has a significant meaning.

But however this might be held if the first part of the clause stood alone, the second part shows plainly that the parties really intended by "*discharge*," "*delivery*" — and that the shipowners meant to relinquish the right to enforce payment of freight for five and ten days after the goods were delivered to the consignees. It reads thus: "*Said credit in payment of charter not to impair shipowners' lien on cargo for freight.*"

The first part, then, was meant to give a "*credit.*" That im-

plies confidence and time. When sales are made on *credit*, the goods are delivered on the faith that the purchaser will pay when the term of *credit* expires. No one ever heard of a sale *on credit*, the vendor retaining possession till the goods were paid for. There would be no *credit* in such case; it would be a sale for cash on delivery. So in this case: if the shipowner did not deliver the goods until the freight was paid, he would give no *credit;* and yet the contract says in terms that he was to give a *credit* of five and ten days. He was therefore bound to *deliver* the goods, and trust the freighter during that time, and he had no right, under ordinary circumstances, to demand his freight, or sue the goods or their owner, until the time of credit should expire. Again, the parties thought it necessary to stipulate that such credit should not impair the shipowner's lien for freight. But if the only meaning of the contract was that the shipowner should not have the right to demand his freight till five and ten days after the cargo was unladen, he retaining possession the while, this part of the clause has no meaning. So long as he held possession, there could be no question as to his lien. The parties had in their minds something to be done which might be construed as a waiver of the lien, and they intended to exclude that conclusion. The only thing they could contemplate was *delivery*, and therefore they meant to say, and did say, that *delivery* should not be considered a waiver of the lien.

The legal effect of this agreement is to be considered hereafter. Whatever that may be, there can be no doubt that, when this contract was made, the parties intended that the freight should be payable in five and ten days after the goods were *delivered*, and that the *credit* should not impair the *lien*. On any other construction, the second part of this clause is deprived of all meaning, and the first of all practical use. Supposing *discharge* to be used as synonymous with *delivery*, the whole has a plain and intelligible sense. This may be done without violence to the word itself, which, as frequently if not generally used in commerce, would imply delivery also.

It was suggested in the District Court, that the word "*discharge*" has acquired a settled legal meaning, and must be considered as always to mean mere unlading, and never delivery also, and the decisions in the Volunteer, 1 Sumner, 551,
Logs of Mahogany, 2 " 603,
Raymond v. Tyson, 17 Howard, 53,
were cited to this effect.

It might be sufficient, in answer to this, to refer to the remarks of Mr. Justice Wayne, in the case last cited, upon the construction of charter parties; where it is said that there can be no absolute general rule, and that the intention of parties is the most material consideration. But it will be found, on examining these cases, that there is no ground for the assertion that thereby a definite and settled meaning is given to this word.

In the charter party of the Volunteer it does not occur. The freight was thereby payable ten days "*after the return*" of the vessel. A decision that the owner was not bound to deliver the cargo within that time, certainly gives no meaning to a word not found in the charter party.

In the case of the Logs of Mahogany, the freight was payable five days after the discharge of the cargo. It was insisted by the claimant, that this clause necessarily and absolutely implied delivery. All that was decided was that it did not *of course*, and that, under the circumstances of the case, it was not to be considered as having been used in that sense. There is no intimation that it might not be so used; and the judgment of the Court is based upon inferences, drawn from attending circumstances, as to the sense in which the parties intended to use it.

A decision that *discharge* does not necessarily imply *delivery*, cannot be considered to afford even an inference that in other cases it may not be used to include *delivery*. The whole doctrine of the case is, that the Court will endeavor to ascertain and carry out the actual intentions of the parties; and that doctrine is inconsistent with giving any rigid technical meaning to a particular word.

In the case of Raymond v. Tyson, the meaning of the word *dis-*

charge is not referred to. The cases above cited are mentioned, but without reference to that. The grounds on which the decision is placed are, that charter parties are to be construed according to the intentions of the parties and the usage of trade — that in doubtful cases that construction which maintains the lien is to be upheld; but that when parties have agreed upon a time and place for the payment of freight inconsistent with the exercise of a right of lien, it shall be considered as waived. In other words, that if the shipowner shows an intent, by express agreement, or by stipulations equivalent thereto, to waive the lien, he may do so, and cannot then avail himself of it.

These cases do not therefore give any countenance to the idea that the word *discharge*, when used in a charter party, always and necessarily excludes *delivery*.

Assuming that by this agreement the parties meant that a credit of five and ten days should be given for payment of freight after delivery, and that the lien should not be impaired thereby, it remains to be considered in what manner the rights of the shipowner are affected by it, and what was done under it.

In considering this under the maritime law, which I propose to do in the first place, a difficulty arises from the fact that the common law also gives a lien, dependent on possession; and as the jurisdiction of the English Court of Admiralty does not extend to contracts of affreightment, all the English cases, in which the question of a lien for freight has arisen, have been at common law, and have been decided, of course, according to the principles of the common law, and so the lien there is always treated and considered as a common-law lien. And in this country, where the admiralty jurisdiction is wider, and embraces all these subjects, it will appear that this lien has been usually considered, and the decisions have been based, even in the courts of Admiralty, with respect to the English authorities, without due reference to the fact that the lien is a creature of the maritime law, and to be governed by its principles and practice.

The consequence has been that the lien has been usually spoken

of as a maritime lien, but treated as a common-law lien, depending on possession; and the question usually discussed has been, whether or not the shipowner has retained, or lost, or waived, the right to possession.

I shall attempt to show,

First. That by the maritime law, the shipowner has a lien or privilege upon the goods for the freight; that this lien exists independently of possession, and is not necessarily lost by delivery to the debtor.

In considering this question under the maritime law, all ideas growing out of the common law are to be laid aside, and the subject is to be considered precisely as if there were no common law, no practice under it, and the rights of the parties were to be governed solely by the maritime law.

This law is derived principally from the civil law, and to this we must refer for light on the subject.

By the civil law, a lien or privilege is expressly given to carriers, which was not lost by alienation. 1 Cushing's Domat, 684.

It was subsequently modified in respect to moveables (at least, in France), and was held to be lost by a *bona fide* sale to a third party, but it might be enforced so long as they remained on the hands of the debtor or creditor. 1 Dom. 646.

This privilege was created by express consent, or by operation of law, and took precedence of all other claims. Dom. 664 and 680.

This privilege does not imply possession or property, but is a mere right to resort to the thing itself for payment, which right is preferred to that of all general creditors. It was enforced by the *actio hypothecaria*, to which the modern action *in rem* corresponds.

This right or privilege, existing independent of possession or property, is unknown to the common law, which has no means or process by which it could be enforced — all its modes of remedy and action being *in personam*, no matter what the subject matter may be.

But in the Admiralty Courts the action *in rem* is of daily use: and of course the right to maintain it, in any particular case, does not depend upon any common-law rights or liens, but arises out of the rules and principles of the civil and maritime law, from which its courts derive their jurisdiction and rules for administering it.

By the civil law, as we have seen, the privilege for freight might be enforced against the thing so long as it continued in the hands of the debtor, and was not lost by delivery or any lapse of time, except such as would prescribe the personal action for freight.

The maritime law is founded on the civil law, being in fact nothing but a particular branch of that law in its application to maritime affairs, having a particular court of its own, the Admiralty, but governed by the principles of the civil law. It might therefore be expected that it should recognize this lien or privilege.

From the oldest authorities down to the latest, there is no one principle more explicitly or frequently affirmed, in the maritime codes, than the obligation of the cargo to the ship, and the reciprocal obligation of the ship to the cargo. They rest on the same ground, are of the same nature, and are enforced in the same manner.

The ship is bound to the cargo and the cargo to the ship. The one has a claim on the cargo for freight, the other has a claim on the ship for damage to the cargo; but neither has necessarily a right of possession, or property in the thing against which the claim exists, and it does not depend upon possession.

The owner of the cargo has no possession of or property in the ship, but he has a claim or privilege upon it for damage to his goods, which he may enforce by an action *in rem*.

The reciprocal lien of the owner of the ship upon the goods is of precisely the same nature, to be enforced by the same process, and of course does not necessarily depend upon possession.

Such a maritime privilege or lien does not imply a right of possession or detention. It does not appear that by the civil law the carrier had the right to retain the goods until the freight was paid.

The right to detain the thing itself until payment, seems to be of later growth. It may be found in the Consolato del Mare, chapter 957, where it is said, the master may detain the goods until security is given for payment of the freight — not until it is paid.

In the laws of Wisbuy, which, like the Consolato, are not a code of laws, but a collection of usages, it is laid down in Art. 57, "The merchandise being put on board of lighters, if the master has any jealousy of the merchant's ability or honesty to pay him, he may stop it at the ship's side, and refuse to let it go until his freight is paid."

These seem to be the first express declarations of the right of the master to detain the goods for the freight The lien recognized by the common law probably might be traced to the same usages.

This conditional right of detainer was not intended as a *substitute* for the privilege created by the civil law, but was an additional right, growing out of the conveniences of commerce.

This view is confirmed by the ORDONNANCE, wherein for the first time we find a code of laws, resting as a basis upon the civil law, applying its principles to the necessities of commerce, and incorporating the usages of merchants then existing in practice.

Here the doctrine of the civil law of the privilege upon the cargo for the freight, is expressly affirmed, accompanied with a corresponding obligation on the part of the ship, which does not seem to have existed by the civil law.

That is first announced by Cleirac in his Commentaries on the Judgments of Oleron, page 86, "Le batel est obligé," &c.

In the Ordonnance the general principle is laid down, in Lib. 3, Tit. 1, Art. 11. "The ship and cargo are respectively affected by the conventions of the charter party."

The special practice is defined in book 3, T. 3, § 24.

"The master shall be preferred for his freight upon the goods so long as they are in the ship, in lighters, or on the quay; and for 15 days after delivery, if not passed into the possession of a third party."

This code also recognized the right of lien or detention for

freight in Art. 23, which prescribes that the master shall not detain the goods in his ship for default of payment of freight, but may hinder them from being carried away.

This ordonnance is the best evidence we have of the general maritime law, and when not in conflict with our own laws, and in such respects as are not peculiar to the laws of France, is entitled to great consideration.

The principle of the mutual obligation of the ship and cargo is well settled in England; and though the limited jurisdiction of its Admiralty Court does not allow its practical enforcement in full, yet the existence and nature of maritime privileges, existing independently of possession, are often recognized.

The nature of a maritime lien is no where better defined than in a recent English case, Harmer v. Bell, 22 E. C. L. & Eq. 72.

In this country, under a more extensive admiralty jurisdiction, the enforcement of these liens against ships and cargoes is a matter of familiar practice, in support of which it would be impertinent to adduce authorities.

It must be allowed, then, that the owner of a ship has, by the maritime law, a preferred claim on the cargo for freight, corresponding to that of the owner of the goods on the ship for damage, and of the same nature and effect; that it exists without possession, and gives the party entitled to it a right to proceed *in rem;* and that this right is one separate and distinct from the common-law lien which also exists.

The privilege of the owner of the cargo on the ship is certainly a maritime lien, which cannot be enforced by a court of common law, which exists without possession, and can be enforced only by an action *in rem.* On what ground of reason or authority can what is called the "*reciprocal privilege*" of the shipowner on the goods be reduced to a mere common-law lien, to which possession is essential, and which cannot be enforced by an action *in rem?*

This privilege is therefore a maritime lien in its proper and most effectual sense; it binds the goods, follows them after delivery, and affects them so long as they remain in the debtor's hands, and may be enforced by an action *in rem.*

By the Marine Ordonnance, the time of its continuance is limited to 15 days after delivery. Why this limitation was introduced into the French Code, does not appear. Valin, in his Commentary on Article 24, remarks upon it as unreasonable and astonishing, and considers that the privilege should have been allowed to continue against the thing while in possession of the debtor, until the personal action for freight was prescribed.

The reason was probably, that omission to claim payment within that time would be evidence of intent not to look to the goods, but to the owner, or as laches. And this idea is confirmed by the commentaries of Valin on the ordonnance and Boulay Paty on the code, who both state expressly that this limitation has no effect, if the payment of the freight is demanded within the 15 days; and that being done, the privilege becomes perpetual, and would follow the goods even into the hands of a third party.

Valin, Com. on Art. 24.

Boulay Paty, Com. on the Code, Vol. 2, p. 479.

It seems to be a special provision of the French law, not to be found in other codes or collections of maritime usages, but peculiar to that nation, and not recognized elsewhere, unless, as in the State of Louisiana, by special enactment. It is no where recognized by the maritime law of the United States. The general rule, of the reciprocal obligation of ship and cargo, is of universal application and recognition in all maritime codes. It creates a privilege or preference which is not dependent upon, and in fact does not owe its existence to possession, but in most cases to a service rendered to the thing itself — which the principles and practice of this Court recognize; and the practical application of which is now sought in a case unembarrassed by any outside equities or especial circumstances, calling for equitable interference as against it.

A shipowner's lien for freight is therefore a maritime lien: and a maritime lien, being not a property in the thing, nor even a right of possession, but merely a right to have it sold and the proceeds applied in payment, does not depend upon possession.

The delivery of the goods does not therefore *necessarily* create a loss of this lien.

But a maritime lien or privilege, like all other rights of the same nature, may be excluded by agreement, waived expressly, or impliedly, or lost by laches.

The undisputed liens of salvors, material men, bottomry holders, claimants for damages by collision, even of the mariner for wages, may all be affected and displaced by any of these causes.

So in relation to freight. If the charter party or bill of lading shows that exclusive credit is given to the owner of the cargo personally — if the time of payment is such that the owner of the ship manifestly did not look to the goods for payment, or if he knowingly allows them to pass into the hands of a third party ignorant of his claim, or neglects to enforce it within a reasonable time and thereby enables the owner to injure third parties, it is waived or lost.

Hence it has come to be considered, in analogy to the common-law doctrine, that the lien does not exist after an unqualified delivery: not in fact because it is a common-law lien and depends upon possession, but because such a delivery is evidence of an intent to waive the lien, to look to the personal credit of the owners, and not to the goods.

And this doctrine and practice have become so prevalent, that in the reported cases the question raised has been, not whether the lien is maritime in its nature and therefore not depending on possession, but whether either by the agreement in the charter party, by an unqualified delivery, or otherwise, the parties have shown an intent to look to the personal security and waive the lien.

The idea, that the lien for freight is only a common-law, and not a maritime lien, is never suggested, even in the English cases, and in their elementary books it is usually spoken of as a maritime lien, whether created by the charter party, or by implication of law, but as one which the Court of Admiralty has no power to enforce.

Abbott on Shipping, pp. 127, 284.

In this Court it is always spoken of as *maritime*.

The Freeman, 18 Howard, 188. "Under the *maritime law* of the United States, the vessel is bound to the cargo and the cargo to the vessel for the performance of the contract of affreightment."

The Yankee Blade, 19 Howard, 90. "The merchandise is bound or *hypothecated* to the vessel for freight and charges."

Dupont de Nemours v. Vance, 19 Howard, 171. "The *maritime lien* on cargo for the price of its transportation may be waived," &c.

The Libellants then had a maritime lien or privilege on these goods for the transportation of them. That lien existed when their libel was filed, unless it has been voluntarily surrendered, or has been lost by laches. This lien, which would arise by implication of the maritime law, without an express contract, is here expressly provided for in the charter party, which declares that the merchandise to be laden on board shall be bound for the payment of the freight.

The question therefore is, whether by anything done or said the Libellants have shown an intent to waive this privilege or lien, and rely on the personal credit of the charterers or their assigns.

As the agreement expressly provides for a credit to be given, and that the privilege shall not be impaired thereby, the original parties to the contract would seem to be estopped from setting up the mere delivery as a waiver of the privilege.

It may be suggested, however, that the claimant's intestate was not a party to the original contract, and that the only contract to which he was a party is the bill of lading, by which Wills & Co. of Calcutta shipped the goods in question to him for his account and risk, and by which freight was payable on delivery, and that he stands in the position of a *bona fide* purchaser without notice.

If this were so, the question would arise as to the power of the master of the ship to sign a bill of lading contrary to the terms of the charter party. In Gracie v. Palmer, 8 Wheaton, it was held that he could not.

But the statement on this point in the "Facts Agreed," is cor-

rected by the deposition of Mr. Tuckerman, afterwards taken (p. 12), by which it appears that the charter party was assigned to Wills & Co., and that they indorsed upon it and signed an agreement to fulfil all its conditions. They thereby assumed the place of the original charterers, acquired their rights, and became subject to their agreements, and so had the right to the stipulated credit, and agreed that it should not impair the lien for freight. They were the agents of Augustin Wills, the claimant's intestate, the consignors in the bill of lading. The consignee, the claimant's intestate, knew, it is admitted (see p. 10), that the ship was under charter, and was therefore affected with knowledge of its contents. That he not only knew them, but insisted upon them, is shown by the statement in the Agreed Facts, that the sum of $5000, paid on account of freight, while the ship was discharging, was paid "*as matter of accommodation and not of right.*" The Claimant in his answer swears that the Libellants then had no right to it, that it was solicited as a favor, and granted as such. (See p. 17.) By the account annexed to the libel, the sum was paid October 26th. The ship had arrived on the 12th, and soon after commenced discharging. In fourteen days the larger part of the cargo must have been discharged, and the Claimant, by the 26th, had actually received goods, the freight of which amounted to a much larger sum than $5000. By the terms of the bill of lading, freight was payable on delivery, and the Libellants had, if that were the only contract, the right to demand payment upon delivery, and were not bound to deliver a ton until freight was paid. Why then, after delivering the larger part of the cargo, were the Libellants not entitled to a payment on account, and on what ground could the claimant swear that they had no right to any, and that the payment he made was a matter of grace and not of right? Clearly and only because by the charter party the Libellants had agreed to give a credit of five and ten days after delivery, and because the consignors named in the bill of lading stood in the place of the original charterers, and the consignee claimed and insisted upon the benefit of the credit originally agreed to be given. There is

no other ground on which the right of the Libellants to payment, as the goods were delivered, could be denied for a moment.

The Claimant and his intestate, having insisted upon and had the benefit of this credit, are also estopped to allege that the delivery was a waiver of the lien for freight. They stand in the same position as the original charterers, and have no claim to be considered as *bona fide* purchasers without notice.

Another fact from which a waiver of the lien has been inferred is, that a large portion of the cargo was, at the request of the Claimant, discharged into another vessel to be carried to London. If the Claimant had a right, as the Libellants admit and he then insisted, to the credit agreed to be given by the charter party, he had the right to take the goods and store them where he pleased; and if he selected another vessel, the Libellants had no right to refuse his request to discharge them into it. It does not appear that such vessel sailed before the credit expired, nor is it by any means plain that if she had been about to sail before, and the urgency of the case had demanded, the Libellants might not have arrested the goods. Courts of Admiralty proceed on equitable principles, and if property subject to a maritime privilege was about to be removed from the jurisdiction before a credit should expire, they would not be slow to give the relief which the exigency of the case required. Nor is it plain that the Libellants might not have followed the goods to London and enforced their lien there before they were sold.

But a sufficient answer to this objection is, that a portion of the cargo, much more than sufficient to satisfy the entire freight, remained and was to be stored in Boston, and the Libellants had a right to resort to that for payment of the whole. This is familiar and well settled law.

Abbott on Shipping, page 377.
Angell on Carriers, page 360.
Soddergreen v. Flight, 6 East. 422.
Boggs v. Martin, 1 B. Monroe, 239.
Bernal v. Pim, 1 Gale, 17.

The Libellants could not therefore refuse, at least without being captious and unreasonable, to discharge a part of the cargo into a vessel bound for London, and insist upon holding the whole, worth $100,000 and upwards, for a claim of about $15,000, of which $5,000 had already been paid, while more than enough to pay the balance was to remain in Boston, subject to their right to arrest it, if payment was not made when the credit should expire; and the fact, that they did not refuse, does not raise even a presumption of any intent to waive their right to resort to the residue of the cargo, and is not to be taken into consideration in reference to that. The utmost that could be inferred, would be a relinquishment of the lien on so much as was shipped for London; and the payment of $5,000 on account, before it was due, would prevent any apprehension of non-payment of the balance when it should become due.

In one of the Courts, much stress was laid upon the supposed fact that the libel was not filed till four months after the credit had expired.

It was in fact filed precisely in one month. The discharge was completed November 7th, the ten days credit expired on the 17th, and the libel was filed December 17th. In the mean time the Libellants had repeatedly applied for payment, and were then refused, first on the ground that it could not be made until an administrator was appointed on the estate of the consignee, and afterwards that it was not certain that the estate would not prove to be insolvent.

Mr. Wills was generally supposed to be a man of property; there was no dispute about the amount of freight, a large part had been paid, and, until administration was granted, no one was authorized to pay the balance. As soon as that was done, and the suggestion made that the estate might prove insolvent, a fact not ascertained till long afterwards, the libel was filed. In other words, it was filed as soon as the Libellants had the right and knew that it was necessary to invoke the assistance of the law to enforce their lien, and there was no reason why they should resort to it before that time.

These circumstances would seem to afford a sufficient reason for the brief delay which took place, without supposing that it arose from, or tended to prove any intent on the part of the Libellants to waive their lien.

The broad question is hereby suggested, whether any length of time, short of that which would bar a personal action, would prevent the enforcement of a maritime lien *between the parties*, if there were no change of property.

It is not necessary for the Libellants to maintain this position, because here was an agreement, and there was no unreasonable delay. It may be remarked, however, that by the civil and maritime law, the lien continues in force until the thing is sold, or the personal action is prescribed. And there seems to be no reason of policy against this doctrine. It is not liable to any objection as creating a *secret lien*, because it could not be availed of as against third parties ignorant of it; and from its maritime nature, and in analogy to other cases, it might well be held, that where goods, subject to a lien for freight, are delivered without reservation, the owner of the ship might enforce it against the goods while remaining in the hands of the consignee.

In those cases in which it has been held that delivery, or an agreement to deliver, before payment destroyed the lien, it will generally, if not always, be found that the rights of third parties had intervened.

If the lien or privilege for freight is maritime, it cannot depend upon possession.

By some authorities, the loss of the lien *by a sale* is considered, as it would seem to be, an exception to the general rule. A late writer, after laying down the general rule that the *hypothec* is not affected by the vicissitudes of the *res*, adds: "The Admiralty has admitted an exception to this rule in the case of the cargo. The *hypothec* upon that is enforced so long only as it continues to appertain to the owner, whose property it was at the time of the creation of the lien. But if it has been subsequently sold and delivered to other persons, the Admiralty, from reasons of policy,

or from the impossibility of delicting and identifying it after its dispersion and change, considers the lien to be obliterated, or at least so treats it, and only assists the suiter by a personal proceeding against the original owner."

London Law Magazine, Vol. 52, No. 104.

Boston Law Reporter, Vol. 17, p. 424.

It is not, however, inconsistent with the nature of this lien as maritime, to consider an absolute delivery as presumptive evidence of intent to waive it and look to the personal credit of the owner — especially as possession usually accompanies this and not other maritime liens, and parting with it, voluntarily and without qualification, seems to be inconsistent with the intent to look to it as security.

Another fact by which the decision in the Court below appears to have been influenced, is the statement in the "Facts Agreed," that the goods were delivered "without qualification."

It was not intended to express by this any more than that the right of lien was not then spoken of and asserted, nor is any thing more necessarily implied thereby. The shipowner, of course, knew the terms of the charter party, and that he was bound to deliver the goods before he was entitled to his charter money. He did not suspect the solvency of Mr. Wills, there was no dispute as to the amount of freight, and a partial payment was made when asked for. He had therefore no reason to suppose that the balance would not be paid when due, and no occasion to assert his right of lien in anticipation that it would not be. The consignee also knew of his right to receive the goods before paying the freight, and insisted upon it, as has been shown, and he of course had no reason to mention the lien.

There being an agreement in writing that there should be a lien, and a credit for the payment of freight, and that this credit should not impair the lien, and neither party anticipating the necessity of a resort to it, there was no occasion to mention it. No inference can be drawn, from mere silence on the part of the shipowner, that he intended to waive so important a right, and as the law favors

the lien, it will not presume an intent to waive it on such slight grounds.

Another argument suggested adverse to the Libellants' claim, is that if, as is insisted, *discharge* means *delivery*, then the *delivery* was to precede payment, and the lien was suspended and lost.

To this it may be said in reply,

First, That the lien, if maritime, does not depend on possession, and is not necessarily waived by parting with possession, though, if unexplained, that may be strong evidence of an intent to waive it.

Second, That the parting of possession in this case was in pursuance of an agreement, to which the consignee had become a party, that it should not be deemed a waiver.

Third, That the goods were never discharged from the lien, nor was it ever suspended; but that it attached to the goods before delivery, followed them into the hands of the consignee, and held them there, subject only to the agreement of the shipowner that he would not enforce it for a few days. In no other way can the terms of the agreement, "*that the credit should not impair the lien*," receive their proper meaning. It was never suspended or lost; if it were, it would be "*impaired*."

Fourth, That if suspended or even lost, yet that by reason of the agreement that it might be enforced if the freight was not paid at the stipulated times, it revived on non-payment, and the shipowner might then resort to, and claim the benefit of it as if no delivery had ever been made.

A point which will be considered more fully elsewhere.

It may be suggested that the goods were, at the time of their arrest, deposited in the U. S. warehouses for bonded goods, and could not therefore be legally seized.

In answer to this it may be said — 1, That no such defence is set up by the answer. 2, That it does not follow from the fact that they were so deposited when discharged, that they were there when arrested. 3, That by the marshal's return it appears that he arrested them, which he could not have done if in the custody

of the government; and 4, That being not subject to duties, there could be no reason for putting them in bond.

If however they were in fact in the custody of the government when arrested, it would seem that there had been no such delivery as would, if there had been no express agreement, impair the lien for freight, and the government having yielded possession and setting up no adverse claim, the Respondent could not impeach the Libellants' rights on that ground.

See Ward v. Felton, 1 East. 512.
Wilson v. Kymer, 3 Maule and Selwyn, 160.
Burnham v. Winsor, 5 Bost. Law Reporter, 507.
Northey v. Field, 2 Esp. 613.
Wiltram v. Heyer, 1 Denio, 483.
" " 5 " 629.

If then by the policy of the maritime law, or the stipulation in the charter party, the Libellants were entitled to a lien on these goods for the service rendered in transporting them from Calcutta, it would seem to follow that it has not been lost by the qualified delivery provided for by the charter party, which excludes all inference of an intent to waive it, or by any thing else which has occurred; and that they had the right, when the credit expired, and payment of freight was refused, to resort to the lien, and enforce it against the goods in the only Court by which this specific relief could be given.

The facts shew an express contract for a lien, an agreement that it should not be impaired by delivery on a short credit, a delivery under that agreement, a demand when the credit expired, a commencement of suit within a reasonable time after the demand was refused, before the goods had passed into the hands of a third party, and good reasons for the short delay which actually occurred.

There is no proof, express or implied, of any intent to waive or surrender the lien, nor of *laches* in enforcing it. The Libellants are therefore entitled to the benefit of it, and to a decree against the goods arrested.

SECONDLY.

A Court of Equity would, in a similar case, give the relief now asked for by enforcing the lien.

The jurisdiction of a Court of Admiralty is not that of a Court of Equity; but, so far as its jurisdiction extends, it is administered on the same principles. It is, as has been said, the "Chancery of the Seas." Freight, and the lien therefor, are proper subjects of Admiralty jurisdiction, and in considering any particular case growing out thereof, reference may properly be made to the principles by which Courts of Equity are governed in analogous cases.

Among the familiar principles of Equity Law, is this, that an agreement for a lien binds the thing, and creates a trust, as between the parties. Fletcher v. Morey, 2 Story, 565. "In equity there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge *in rem*, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself and his personal representatives, and against any person claiming under him voluntarily or with notice."

In this case there is an express agreement, that the cargo should be bound for the payment of the freight; and another, that the credit, which was to be given for the payment of the freight, should not impair this lien.

The consignee, if not an immediate party to this contract, had notice of it, and insisted upon and had the benefit of the credit. He cannot therefore plead ignorance of the contract, or allege that the lien was impaired by reason of delivery according to it.

In equity he is bound by the contract, and the lien would be enforced against him as a trustee, without regard to possession.

In the case just cited, the plaintiffs had sold goods to the defendant's assignor on credit, under an agreement that they should have a lien on them and the proceeds for payment. The goods were delivered to the purchasers and brought to this country. They not performing their contract of payment, it was held that

the lien agreed for could be enforced against the goods, and the proceeds of goods which had been sold, in the hands of the assignee. The same principle is recognized in

Collyer v. Fuller, 1 Turner & Russell, 469.
Alexander v. Heriot, 1 Bailey Ch. 223.
Welsh v. Usher, 2 Hill S. G. Ch. Rep. 167.
Read v. Hill, 2 Dessau. 552.
Dow v. Ker, Spear's Ch. Rep. 413.

It would not therefore admit of a question, that the Libellants might have enforced this lien against the goods, or their proceeds, in the hands of the consignee or his representative, by bill in equity.

In this case, the subject matter, freight and the lien therefor, being of a maritime nature, the relief is properly sought in the Maritime Court, which, within its jurisdiction, administers the law according to the rules and principles of Courts of Equity.

THIRDLY.

If, however, it should be adjudged that the lien for freight is not maritime, or is excepted from the general rule that maritime liens do not depend upon possession, and that it is to be considered, so far at least as possession goes, as a mere common-law lien; and though, from its original maritime nature, a proper subject of Admiralty jurisdiction, yet to be considered and governed by the rules of the common law; it will not be conclusive against the claims of the Libellants — because it will be found that under similar circumstances courts of common law have recognized and enforced the lien, although there has been no possession.

The facts in the case show an agreement for a lien — an agreement that credit should be given for the payment of freight — an agreement that this credit should not impair the lien.

The master had no authority to vary the terms of the charter party made by his owners, and never assumed to do so. He did indeed take freight at lower rates than those named in that instrument, but he received security against loss thereby, by a shipment of merchandize on account of the original charterers, made for this very purpose. The assignees of the charter party agreed to perform its conditions; they are the parties under whom the respondent's intestate claims; he knew of the charter party, and had the benefit of the credit thereby agreed to be given, and is bound by its contents, and estopped from alleging that the delivery made to him was a waiver of the lien.

Where a lien exists, and there is an agreement, express or implied, that it should not be lost by parting with possession, courts of common law will give effect to the intentions of the parties and enforce the lien.

Small v. Moates, 9 Bing. 574, is very strong to this effect. In that case there was a charter party, by which, it would seem, that the vessel was *let* to the charterer, and out of the possession of the owner. It contained also an agreement that the owner should have a lien for freight. It was insisted that the owner, not

being in possession, could have no lien. But it was adjudged that, there being an express agreement for a lien, the question whether or not the owner of the ship was entitled to or had possession was immaterial, and that *by reason of the agreement* the owner was entitled to the lien.

Wilson v. Kymer, 1 Maule & Selwyn, 167. It was held that goods, subject to a lien for freight, might be delivered, upon an understanding that the freight should be paid in the same manner as if the goods had been retained for the lien; that such an understanding might be inferred from the facts, and would bind the party receiving them, and that the lien might be enforced against him.

Bigelow v. Heaton, 6 Hill, 43 — 4 Denio, 496. In this case it was held that a lien was not lost if possession was divested by fraud, and intimated that it would not be if parted with under an agreement that the lien should not be affected.

The same effect is given to an agreement, that parting with possession shall not divest the title or lien, in other cases.

Dodsley v. Varley, 12 Ad. & Ellis, 632. Plaintiff sold wool to the defendant, who removed it to his warehouse used for storing, where it was weighed and packed, with the understanding that it was not to be moved thence till paid for. It was held that the property passed, but that the plaintiff retained a special interest, independent of possession, and consistent with the property being in the defendant.

Hussey v. Thornton, 4 Mass. 405. If one agrees to sell goods on condition that the vendor furnish a surety for the price, and delivers the goods before the surety is furnished, declaring that he does not intend to waive the condition, the property, as between the parties, will remain in the vender.

These authorities establish the doctrine, which is obviously required by the principles of equity and rules of fair dealing, that when a party is entitled to a lien, and parts with possession under an agreement that his rights shall not be impaired thereby if his claim is not paid, that in such case he may enforce them as if he

had never given up possession, and the other party shall be precluded from setting up such a defence as contrary to equity and good conscience.

That, it is submitted, is precisely the present case. There was a stipulation for a lien — an agreement for a credit of five and ten days for the payment of freight, necessarily implying delivery, confidence and time, and an agreement that the lien should not be impaired thereby.

In pursuance of these agreements, the goods were delivered to the claimant's intestate, who, if not a party to the original contract, knew its contents, and claimed and had the benefit of the credit. As the representative of the estate and its creditors, acting *en autre droit*, the claimant may be justified in submitting the case to the decision of the Court, but it may be said, at least, that he sets up a merely technical defence against a plain equitable right, and that is not one which receives favor at the hands of a Court which administers justice upon equitable principles.

The Libellants believe that their case is entitled to the favorable consideration of the Court, as resting upon the agreement of the parties, and upon the principles on which justice is administered in the Courts of Admiralty, Equity and Law, and that in either Court they would be entitled to demand and recover from the Claimant the stipulated freight. They elected the Court of Admiralty, because that only could give relief by arresting and holding the goods transported. The goods were taken in the hands of the Claimant before sale or other disposal, their right to payment from out of the same is not disputed by any third party, and they submit their claim with entire confidence to the consideration of the Court.

F. C. LORING,
Proctor for Libellants and Appellants.

Charles G. Loring
Counsellor Libellants

Supreme Court of the United States.

DECEMBER TERM, 1860.

No. 126.

PAUL SEARS ET AL.

LIBELLANTS AND APPELLANTS.

vs.

4885 BAGS OF LINSEED, ETC.

RUFUS WILLS, ADMR. CLAIMANT.

REPLY FOR THE APPELLANTS.

REPLY FOR THE APPELLANTS.

THE statement in the argument for the Appellee, that Wills & Co. "put up the vessel as a general ship," is not, perhaps, material. It is not to be found in the Answer or the Facts Agreed. Nor can it be inferred. The fact is, that Wills & Co. shipped all the goods except 50 bales. Record, pages 10, 12.

The circumstances under which delivery was made have been already referred to. It is argued that it was absolute and unqualified because nothing was said as to terms and conditions at the time. But if there was an agreement in writing, that the delivery should be made on certain conditions, it cannot be contended that delivery made in pursuance of it was unconditional because the agreement was not spoken of at the time. There was no occasion or necessity for so doing. Certainly not, unless the consignee had no knowledge of the condition, and unless it imposed a burden and did not confer a privilege.

It seems to be conceded, in the argument for the Appellee, on page 6, that if the consignee had notice of the special dispositions of the charter party, he would be bound thereby.

That he had such knowledge, is understood by the Appellants to be admitted in the pleadings and statement, but it is now denied.

On page 5 of the argument, it is said, "Augustin Wills was no party to any such agreement;" "the statement that the consignee knew that the ship was under charter, is a very great mistake;" "there is no such evidence." "On the contrary, it is clear that he could not actually have known that such was the fact." On page 6, "It surely will not be seriously contended that Augustin Wills under the bill of lading could claim the benefit of the credit provided for in the charter party." On page 9, "The agreed

facts negative the idea that he actually or constructively knew anything of the contents, or even of the existence of the charter party."

The alleged ignorance of Mr. Wills of the charter party and its contents, appears to be the only ground of defence substantially relied on. This suggests two questions for consideration:—one, whether, under the circumstances, knowledge of the charter party is material; another, whether he did have it or not.

By taking an assignment of the charter party and agreeing to perform its conditions, Wills & Co. assumed the place of the original charterers, became entitled to their rights and privileges, and incurred their obligations. One of the privileges was a right to delivery of cargo before payment of freight, with a corresponding obligation that such delivery should not be deemed a waiver of the lien for freight. Wills & Co. were the agents of Augustin Wills for the purchase of goods at Calcutta, and for the shipment of them to Boston; of course, with power to fix the rates and terms of shipment. There is no allegation and no pretence that they undertook to vary the conditions of the charter party, or depart therefrom in any respect except the rate of freight. Under such circumstances it must be assumed that the goods shipped to Augustin Wills, were shipped upon the terms and conditions of the charter party; they were shipped by his agents, who were in fact the charterers; he claims under them, and he is estopped to question or deny the rights of the ship-owners under the charter party.

There is nothing in this stipulation derogatory to the rights of the consignee; on the contrary, it gives him a privilege to which, otherwise, he would have no claim. If Wills & Co. had chartered this vessel in Calcutta, and caused this provision to be inserted, it could not be questioned that they must have done it for the benefit of the owners of the goods to be shipped, and that they would be entitled to the privilege, and bound not to take advantage of it as a waiver of the lien. By becoming assignees, Wills & Co. stand precisely as if original charterers; and in contemplation of law it was agreed by them with the owners that their consignee, Augustin Wills, should have the right to a credit of five and ten days for payment of freight, and that such credit should not impair the ship-owners' lien for freight.

Under and by virtue of this agreement, Augustin Wills received the consignment made to him, and was not required to pay freight

on delivery, which the ship-owner otherwise would have been entitled to claim. He has suffered no loss, injury, or damage thereby; no creditor has been imposed upon or prejudiced; the goods are made subject to no additional burden, and to none other than what the laws of all commercial nations impose upon them; and there is no principle of justice or equity which can be brought forward to sustain the claim of the Respondent to hold these goods free of freight.

On the contrary, he claims in privity with the substituted charterers; they were his agents, and he is affected with their knowledge and bound by their contract. Moreover, he has had the benefit of that contract, and cannot repudiate the obligation by which it was accompanied. By receiving the goods subject to the lien, he became a trustee for the party entitled to it; and having paid no consideration for the delivery, he cannot conscientiously detain them now that he is made aware of the rights of the ship-owner, or assert that delivery was a waiver of the lien if he had no previous knowledge of the charter party.

Again. The master had no authority to sign a bill of lading or enter into any contract contrary to the terms of the charter party.

This rule, founded on the principle, that an agent cannot exceed his authority, is well settled, and will be found to be supported by the cases cited in the argument for the Appellee. It was elaborately discussed in the case of Gracie v. Palmer, 8 Wheaton.

If the master of this ship had undertaken to vary the terms of the charter, or accept freight on lower terms than those stipulated in that instrument, his action would not have bound the owners, and the goods shipped would have been liable to pay the charter rate of freight.

There is no allegation or pretence that the master of this vessel undertook to alter the terms and conditions of the charter party in any respect. By the arrangement made, the ship-owners were entitled to the amount of freight originally agreed upon.

The case thus finds that the stipulations in the charter party as to delivery and its effect, have never been changed; that the persons under whom the Respondent claims, and who were his agents, expressly assented to it, and bound themselves to comply with it; that they were fully authorized by him to do so, and that he has had the full benefit of the performance of the agreement on the part of the ship-owners. It would seem to follow that he was under a reciprocal

obligation to perform the other part of the contract, and estopped from setting up the delivery as a waiver of the lien, even if he did not know there was a charter party till the goods were delivered to him.

But, if it is necessary to prove knowledge of the charter party and its contents on the part of Augustin Wills, or the Respondent, the Appellants submit that it is shown.

The proposition to be made out is that Augustin Wills had knowledge that there was a charter party. If he knew that, he is legally affected with knowledge of its contents.

It is said in the argument for the Appellee, that he was no party to the contract, that he knew nothing of the contents of the charter party or even of its existence, and could not have known of it.

The Appellants on the other hand, with equal confidence, allege that he knew there was a charter party, that he knew that it contained this agreement, and that he and his agent and representative the Respondent, acted upon it, and did and said what otherwise they could not have done and said.

The case is submitted *upon the facts stated and the inferences to be drawn therefrom.* Record, page 9.

That he was not a party to the contract by signing and sealing, is of course to be admitted; that he knew it and its contents is an irresistible inference from the facts agreed, and is distinctly admitted in the Answer.

The facts upon which this inference arises are these. Wills & Co. were the agents of Augustin Wills, for the purchase and shipment of goods in Calcutta; they had bought, or were about to buy and did buy merchandise for his account to an amount much exceeding $100,000, about the time they re-chartered this ship; they in writing assumed all the obligations of the charterers. They of course knew the contents of the instrument, and that it contained this stipulation, intended for use at the port of discharge, but of no use at the port of shipment. After this they shipped this large amount to Mr. Wills.

It is to be supposed that they forwarded to him invoices, bills of lading, &c., and wrote to him concerning the terms of shipment. As the charter contained this stipulation, so advantageous to the consignee, it must be presumed that it was mentioned in these letters. If sent, as is usual, by the over-land mail, such letters would arrive long before the vessel; if by the vessel, they must have been

opened and read before the goods were entered at the Custom House, and before any were discharged. The presumption from these facts is irresistible that when the goods were discharged and received, Mr. Wills or his agent knew that the vessel had been re-chartered by Wills & Co., and of his right to a credit in payment of freight.

Again. Such knowledge is to be inferred from there being no denial of it in the Answer or the evidence in the case. The libel sets forth that the vessel was under charter and the agreement as to the payment of freight.

The Answer expressly admits these facts, and does not allege or suggest that the consignee, or his agent the Respondent, was ignorant of them, and there is no allegation to that effect in the facts agreed, or any thing from which it can be inferred.

If ignorance of the charter party and its contents was so material a fact as it is now supposed to be, how is this total silence in respect to it to be accounted for?

The Respondent had all Mr. Wills's correspondence at his command. If it was silent in respect to the charter party, and its contents, a fact supposed to be so important could not have escaped attention. The absence of denial of knowledge is equivalent to an admission of it.

The Appellants conceive, however, that there is no necessity for inference, and that such knowledge is distinctly admitted.

This is shown by the admission in the Answer, of the existence of the charter party, and that it contained this agreement, page 5—by the statements in the answer, on pages 6 and 7—that before Nov. 2d the Respondent paid $5000 on account of freight, not because he was required to do so, or that said Sears had at that time any right to require it, but because it was asked as a matter of favor—and it was so paid before it was required, and before there was any right to require it. This is the statement of the Respondent under oath.

In the facts agreed, page 8, it is stated that before the death of Mr. Wills, the Claimant, as his agent, at the request of said Sears, who represented that it would be an accommodation, paid him $5000 on account of freight.

This payment was made Oct. 26, as appears by the account annexed; the vessel arrived Oct. 12; and in the fourteen days which had elapsed, the bulk of the cargo must have been discharged and delivered. If the bill of lading was the only contract between the

parties, the ship-owners had the right to insist upon payment of freight on discharge, and before delivery. Why then did they ask for a partial payment as a matter of favor, and why was it granted as a matter of accommodation?

No answer can be given to this question, except that by the terms of the charter party, the consignee was entitled to a credit in payment of freight of five and ten days after the discharge of the cargo. As the cargo was not then entirely discharged, no freight was due, and such payment was made not because it was due, but as a matter of favor.

If Mr. Wills or his agent did not know of the charter party and its contents, they could not have refused to make such payment, or deny the right of the ship-owner to demand it.

On these facts it is submitted that it was not a very great mistake to allege that "the consignee knew that the ship was under charter and was affected with knowledge of its contents." It might have been stated with perfect correctness that he knew of the charter party, of this particular agreement in it, and claimed and had the benefit of the privilege granted thereby.

It is argued that when there is a bill of lading, it is the only contract to be regarded. This is true only to a limited extent. When there is no other contract, it of course determines the right of the parties so far as therein expressed, but when there is a charter party, it is subordinate to that, and is little more than a receipt for the goods shipped, especially when the shipper is the charterer and the agent of the consignee, or when the consignee has knowledge of the existence of the charter party.

Under some circumstances, a bona fide endorsee of a bill of lading for a valuable consideration, without notice, may possibly have rights as against the ship-owner without regard to the charter party.

Under what state of facts, if any, such a right may exist, it is not necessary to consider now, because the Claimant is not an endorsee, because he has parted with no consideration, and because he had knowledge of the existence of the charter party when he received the goods.

It is suggested, in behalf of the Respondent, that the lien for freight is not a maritime privilege, but a mere right of detainer; and that independently of the provisions in some maritime codes, which allow the ship-owner to enforce his lien within fifteen days

after delivery, it would be lost by delivery—or, in other words, that the lien for freight is a common law and not a maritime lien.

If this could be shown, it would not, for reasons before stated, be conclusive in favor of the Respondent. Pardessus is cited to support it; but he gives no countenance to it; on the contrary, he says, sec. 1205, "Les sommes dues aux voituriers sont privilégées sur ces objects;" "on ne perd pas son privilege par le seul fait qu'il se seroit dessaisi." Sec. 961. "Les marchandises chargées sont affectées par privilege au paiement du fret." This privilege exists because of the service rendered to the goods by the carriage, and is preferred to all others, as he states in section 960. What he means in section 962 is, that the master, instead of delivery and trusting the consignee for fifteen days, may put the goods in the hands of a third party as bailee, to secure his lien, which might be endangered if the consignee was not to be trusted, or should sell the goods within the fifteen days. That the continuance of the privilege for fifteen days after delivery is owing to a special provision in the French codes, is also suggested. Valin, as before quoted, considers this limitation of the privilege for freight unreasonable and unjust, and that it should have been allowed to continue, as it did by the Maritime Law, until the action for freight was proscribed or the goods had been sold.

The other cases cited go not beyond the statements in the opening argument, that the lien for freight is lost by delivery, *if absolute and unqualified;* and that if exclusive credit is given to the owners of the cargo personally, or if the time of payment is such that the owner of the ship manifestly did not look to the goods for payment, it may be considered as waived and lost. In Raymond v. Tyson, the language of the Court is, "The lien may be adjudged to have been waived without an express agreement, if there are stipulations in the charter party inconsistent with the exercise of such lien, or when it can be inferred from the language of the instrument, that the owner meant to trust to the personal responsibility of the charterer." A stipulation for a short credit, and that delivery should not be a waiver, forbids such inference. Again, "If it be only doubtful in the construction of a charter party whether the owner has waived his lien upon the cargo, he must have the benefit of the doubt." Again, "An express contract is the surest and strongest ground upon which that right can rest, and by inserting